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In the Supreme Court of the United States

OCTOBER TERM, 1995

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL., PETITIONERS

v.

MIKE FOSTER, GOVERNOR OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Lead Contamination Control Act of 1988, 42 U.S.C. 300j-24(d), which provides that each State is to develop a program to remove lead contamination from the water coolers in the schools in the State, contravenes the Tenth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 81 F.3d 1387. The opinion of the district court on attorney's fees (Pet. App. A19-A28) is unreported. The district court's earlier opinion, denying the state respondents' dispositive motions (Pet. App. A28-A59), is reported at 842 F. Supp. 227.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1996. The petition for a writ of certiorari was filed on July 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Lead Contamination Control Act of 1988 (LCCA or the Act), 42 U.S.C. 300j-21 *et seq.*, Congress addressed the pressing health problems caused by lead contamination in drinking water. Of particular concern to Congress was the threat posed to children by lead contamination in school water coolers. Congress accordingly directed the Environmental Protection Agency (EPA) to publish, after notice and comment, a list of the brands and models of water coolers that are not "lead free," 42 U.S.C. 300j-23(a), and to distribute that list of water coolers to the States, 42 U.S.C. 300j-24(a). EPA was also required to publish and distribute to the States a guidance document and testing protocol designed to assist schools in determining the source and degree of lead contamination in their drinking water. 42 U.S.C. 300j-24(b).

Each State, in turn, was called upon to disseminate the information received from EPA to local educational agencies within the State. 42 U.S.C. 300j-24(c). In addition, the Act provided that each State "shall establish a program * * * to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools." 42 U.S.C. 300j-24(d)(1). That program was to include measures "adequate to ensure that within 15 months after October 31, 1988, all [lead contaminated] water coolers in schools under the jurisdiction of [local educational] agencies are repaired, replaced, permanently removed or rendered inoperable." 42 U.S.C. 300j-24(d)(3). The Act authorized federal financial assistance for these

programs, 42 U.S.C. 300j-25, but none has ever been appropriated.

2. Following passage of LCCA, EPA developed the guidance document and testing protocol required by the Act. The guidance document was designed to assist "the school official" in understanding the significance of detecting and reducing lead contamination in schools. See Environmental Protection Agency, Office of Water, *Lead in School Drinking Water* at 1 (EPA 570/9-89-001, Jan. 1989) (Guidance Document). In April 1989, EPA published in the *Federal Register* for comment a proposed list of drinking water coolers that are not lead free, and also noted the availability of its Guidance Document. See 54 Fed. Reg. 14,316, 14,320. In January 1990, EPA issued a final list of water coolers that are not lead free, and also proposed additional coolers for listing. 55 Fed. Reg. 1772. In February 1990, EPA issued a Fact Sheet that listed non-lead-free water coolers by brand and model number. The February 1990 Fact Sheet list contained all the cooler models listed in the January 1990 *Federal Register* notice, and also seven additional water cooler models that had been on the April 1989 proposed list. See Gov't C.A. Exh. 1.

3. In April 1989, the Governor of Louisiana appointed a task force to develop guidance for the State's implementation of LCCA. The Louisiana Office of Public Health, the lead agency designated for implementation of the state plan, was to distribute information and inventory forms to all private and public day care centers and schools; to develop a working group to assist the schools in lead contamination detection; to provide training of day care and school personnel; to arrange for collection of water samples; to conduct monitoring based on the results to ques-

tionnaires; and to discuss or arrange for removal of sources of lead contamination. Gov't C.A. Exh. 2, at 4. The State originally anticipated that all testing could be accomplished within the time set by LCCA. *Id.* at 5-7.[1] Nonetheless, by September 1993, the State reported that only 28% of all schools had been tested for lead contamination in drinking water. Gov't C.A. Exh. 3, at 2.

Louisiana distributed EPA's Guidance Document to schools and day care facilities in June 1989. Gov't C.A. Exh. 2, at 5. It had not, however, distributed any list of non-lead-free water coolers to its schools by February 14, 1993. See Pet. App. A29. On that date, petitioners sent the State a notice of their intent to file a citizen's suit under the Act, as required by 42 U.S.C. 300j-8(b)(1). They maintained that the State had violated LCCA by failing to disseminate the EPA-prepared list of lead-contaminated water coolers, and by "failing to implement a remedial action program consistent with [42 U.S.C.] 300j-24(d)." Gov't C.A. Exh. 4, at 1. On April 5, 1993, following receipt of petitioners' letter, the State sent schools the EPA Fact Sheet listing lead-contaminated water coolers. See Pet. App. A29.

4. On May 4, 1993, petitioners filed suit in district court, alleging that the State had violated LCCA by failing to establish a remedial program to assist schools in remedying lead contamination in water

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[1] The Act provided that all water coolers in schools containing lead contamination were to be removed, repaired, replaced, or rendered inoperative by January 31, 1990. See 42 U.S.C. 300j-24(d)(3).

coolers.[2] Petitioners subsequently amended their complaint to allege that Louisiana had also violated LCCA by failing to distribute EPA's list of water coolers that are not lead free. Petitioners contended that the State should have disseminated the January 1990 list published in the *Federal Register*, not the February 1990 EPA Fact Sheet.

The State moved to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment. The State argued that petitioners' notice of intent to file a citizen's suit was inadequate, and that petitioner ACORN had no standing to sue. The district court denied those dispositive motions on November 15, 1993, concluding that the State had "more than sufficient information to identify the specific requirements allegedly violated," Pet. App. A35, and that ACORN had standing, *id.* at A40. The State then filed a motion for reconsideration of that ruling, in which it contended that, if the provisions of LCCA that ACORN sought to enforce could be the subject of citizen's suits against the State, then LCCA violated the Tenth Amendment. The district court denied reconsideration. See Pet. 12.

On February 24, 1994, Louisiana distributed the January 1990 EPA water cooler list to its schools. On May 16, 1994, the State filed another motion for summary judgment, arguing that petitioners' claim as to distribution of EPA's list was moot. The State also argued that, as to petitioners' remaining claim, the district court had no jurisdiction under the citizen's

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[2] Petitioners' suit was brought against Louisiana state officials acting in their official capacity, not the State itself, but for simplicity we refer to the state respondents in this brief as "the State" or "Louisiana."

suit provision. Petitioners then "decid[ed] that fairly reasonable improvements had finally been made to the LCCA program activities" (see ACORN's Reply to State's Opposition to Motion for Attorney Fees at 5), and, on May 31, 1994, they requested that the State consent to a motion for voluntary dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. After the State refused to consent to a voluntary dismissal, petitioners decided that they would not contest dismissal of the suit. *Ibid.* The district court subsequently dismissed all of petitioners' claims as moot. See Pet. App. A12.

5. Petitioners then filed a motion for attorney's fees. The district court granted that motion, concluding that petitioners were prevailing parties, even though their claims had been dismissed as moot, because petitioners had shown that "their lawsuit was a significant catalyst or a substantial factor" in inducing the State to comply with LCCA. See Pet. App. A24. The district court noted that the State had mailed the EPA Fact Sheet to local schools only after petitioners sent their notice of intent to sue, and that "only after [petitioners] filed the instant suit did the state defendants go to the schools identified in [petitioners'] complaint and assist in the testing of water coolers as required by the LCCA." *Ibid.* The court also noted that only after the lawsuit was filed had the State "discharged [its] duties * * * and sent the required Federal Register list [of non-lead-free water coolers to schools], thereby fulfilling one of the two goals sought by [petitioners]." *Ibid.*

The State appealed the award of attorney's fees. After oral argument, the court of appeals ordered supplemental briefing on the question whether Section 300j-24(d) violates the Tenth Amendment. The

United States then intervened in the court of appeals, pursuant to 28 U.S.C. 2403. In its brief, the United States argued that the court of appeals did not have to reach the constitutionality of Section 300j-24(d), because the fee award could properly have been based on petitioners' separate claim that the State had violated Section 300j-24(c) by failing to disseminate EPA's list on non-lead-free water coolers, and that Section 300j-24(c) is plainly constitutional. See Gov't C.A. Br. 15-35.[3]

6. The court of appeals reversed the fee award. Pet. App. A1-A18. The court first rejected the argument that the fee award could properly have been based on petitioners' claim that the State had violated Section 300j-24(c). The court assumed, for purposes of deciding the case, that the States were required by that Section to disseminate the list of non-lead-free water coolers published by EPA in the *Federal Register*. It concluded, however, that Louisiana had complied with that requirement even before this lawsuit was filed, because the EPA Fact Sheet disseminated by Louisiana before the lawsuit included all the models also listed in EPA's *Federal Register* notice. Therefore, the court concluded, petitioners had failed to show that the State had violated Section

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[3] The United States also argued that the constitutionality of Section 300j-24(d) was not properly presented, because ACORN had not properly alleged a violation of that provision. The United States noted that "ACORN's complaint does not allege that the state has not *developed* a program" required under Section 300j-24(d) to assist schools in remedying lead contamination from water coolers, but rather "it is 'the implementation of the program that failed to pass muster * * *' that concerns ACORN." Gov't C.A. Br. 37. The court of appeals did not address that argument.

300j-24(c), and were not entitled to attorney's fees based on that claim. See Pet. App. A10-A11.

The court of appeals then addressed petitioners' claim based on the State's alleged violation of Section 300j-24(d), and ruled that that provision contravenes the Tenth Amendment, as applied by this Court in *New York* v. *United States*, 505 U.S. 144 (1992). Pet. App. A11-A17. The court concluded that "LCCA gives the States no alternative but to enact the federal regulatory plan as prescribed in § 300j-24(d), and such Congressional conscription of state legislative functions is clearly prohibited under *New York*'s interpretation of the limits imposed upon Congress by the Tenth Amendment." *Id.* at A16. "Section 300j-24(d)," the court stated, "is an attempt by Congress to force States to regulate according to Congressional direction. As the *New York* Court explained, the Constitution does not permit Congress to so control the States' legislative processes." *Id.* at A17. Accordingly, because petitioners had failed to establish that the State was in violation of "any lawful requirement of the LCCA at the time [they] commenced this suit," the court ruled that the award of attorney's fees was improper. *Id.* at A18.

ARGUMENT

The court of appeals concluded in this case that 42 U.S.C. 300j-24(d) violates the Tenth Amendment, as applied by this Court in *New York* v. *United States*, 505 U.S. 144 (1992), because it coerces the States into "regulating according to Congressional instruction." Pet. App. A16. The court concluded that "such Congressional conscription of state legislative functions is clearly prohibited under *New York*'s interpreta-

tion of the limits imposed upon Congress by the Tenth Amendment." *Ibid.*

Ordinarily, a decision of a court of appeals holding invalid an Act of Congress would warrant review by this Court. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). This case, however, presents unusual circumstances, for the decision below has no further practical consequences for the federal effort to address lead contamination in schools. The statutory deadline for States to establish programs under LCCA to assist local schools in remedying the problem of lead contamination in water coolers, July 1989, has passed, and every State, including Louisiana, now has in place such a program (even though some States may have missed the statutory deadline). Moreover, whereas the States may have been under a congressional mandate in LCCA to establish programs to assist local schools to remove lead contamination from water coolers, participation in such programs by the local schools themselves is voluntary and is not compelled by LCCA. See Pet. 7 (acknowledging that point).

Accordingly, EPA believes that the States have now done as much as the agency expected them to do under LCCA to address lead contamination in schools. For that reason, the decision below has no impact on an ongoing federal program, and review by this Court is not necessary.[4]

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[4] No other court of appeals has addressed the constitutionality of Section 300j-24(d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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